United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1713

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1713

In the Matter of

A Motion to Compel Arbitration

between

INTEROCEAN SHIPPING COMPANY,

Petitioner-Appellee,

—and—

NATIONAL SHIPPING AND TRADING CORPORATION and HELLENIC INTERNATIONAL SHIPPING, S.A.,

Respondents-Appellants.

REPLY BRIEF OF RESPONDENTS-APPELLANTS

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POINT I

INTEROCEAN'S STATEMENT OF THE EVIDENCE IS SO REPLETE WITH MISSTATEMENT AND DISTORTION THAT IT MUST BE INFERRED THAT THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT ARE NOT, SUPPORTABLE UPON THE RECORD.

The catalog of misstatement and overreaching in INTEROCEAN's Brief is so extensive that we shall only list 31 of the more material ones in the order in which they occurred:

1. *Assertion,* p. 5:

> "Mr. Theodoracopulos specified a mobiltime charter party, excluding clauses 9, 12A ii, 12B ii and 12C iii. He stated that a suitable drydock clause was to be worked out with sufficient advance notice."

Fact: It was not Theodoracopulos who specified the "Mobiltime" Charter Party but rather Germano acting on behalf of Interocean:

> "Q. It was Mr. Germano wasn't it, who asked for the Mobiltime firm in his initial firm offer? A. [By DeSalvo] That is correct."

The exclusion of paragraph 9, 12A, 12B I and 12B II, 12B III in the proposed "Mobiltime" form of charter party were suggested by DeSalvo not Theodoracopulos and this was DeSalvo's testimony (R. 115).

2. *Assertion,* pp. 6-7:

> ". . . Mr. Theodoracopulos accepted that proposal, saying in words to the effect, 'You are confirmed' (R. 28, . . .)"

Fact: The words "You are confirmed", were not those of Theodoracopulos but of DeSalvo himself. (R. 28, 119) Theodoracopulos denied any such confirmation on March 17 (R. 218, 220), and at best the supposed words of Theodoracopulos are nothing more than DeSalvo's guess at what he thought might have been said.

> "The Court: What did he say?
> The Witness: (DeSalvo) I wouldn't know the exact phrase. But we usually say 'You are confirmed'." (R. 28)

3. *Assertion*, p. 6:

> " . . . Mr. Theodoracopulos admitted that National did have subsidiary companies and that he might have told Mr. DeSalvo that one of National's subsidiaries would be the charterer."

Fact: NATIONAL has no subsidiaries. The parent-subsidiary relationship referred to is that respondent HELLENIC INTERNATIONAL ("HELLENIC") is a subsidiary of Hellenic and Shipping Industries, Co., Ltd. for whose vessel owning subsidiaries NATIONAL acts as an operating agent (R. 238).

4. *Assertion*, p. 7:

> "Mr. Theodoracopulos agreed that a guarantee *would* be forthcoming from National . . . (R. 30 . . .)" [emphasis ours].

Fact: As we stated at page 49 of Respondent's Main Brief,

> "There is a world of difference between the Court's finding that Theodoracopulos agreed that a guarantee 'would' be given and DeSalvo's precise testimony that Theodoracopulos said merely than 'an appropriate guarantee could be given'." (R. 30).

5. *Assertion*, p. 9:

> "Mr. Theodoracopulos testified that no one was available at National who could operate the telex machine in order to send a reply that night." (R. 218) Spears testified, however, that *someone was definitely on duty in the telex room because this employee brought the telex to him.*" (R. 250) [emphasis ours]

Fact: The only testimony from Mr. Spears bearing on who was present when the telex arrived is as follows:

"Q. Were you the one who picked that off the telex, Mr. Spears? A. No, it was brought to me.

Q. Do you remember by whom? A. No, I don't remember by whom.

Q. But not by Mr. Theodoracopulos? A. No." (R. 250)

The telex was not sent until 5:36 p.m. and the notion that the person who brought it into Spears was assigned to NATIONAL's telex room and remained until after 6:00 p.m., when Spears completed his discussion of the telex with Theodoracopulos, is gross supposition wholly without support in the record.

6. *Assertion*, p. 9:

"Mr. DeSalvo testified that he received no protest either by telex or telephone on March 17 or at any other time after the fixture had been sent out. (R. 35) It could be inferred that the offices of Poten were still open at 6:00 because the office did not open for business until 11:00 in the morning. (App. 65a, p. 24)"

Fact: This assertion is sheer nonsense. DeSalvo's testimony goes only to the evening of March 17, it does not speak to "any other time after the fixture had been sent out." (R. 35) Theodoracopulos, in any event, did protest the following day. (See Respondents' Main Brief, pp. 11, 68.) The inference that Poten's New York offices were still open at 6:00 because they did not open until 11:00 would be far fetched in any context. The record shows that DeSalvo was referring to the fact that the West Coast (Chevron) "don't open until 11:00 *our* [*New York*] *time.*" [emphasis ours]

7. *Assertion*, p. 9:

> "According to Mr. DeSalvo, two terms [drydocking and 'sub-details'] of the agreement were left subject to finalization later."

Fact: We trust that INTEROCEAN is not seriously contending that where the parties expressly specified that the negotiations were subject to working out a "suitable drydocking clause" and were "sub-details", that these were terms which were left to be "finalized" after inception of the charter. Such a contention would be at complete variance with the evidence. It has not previously been contended by INTEROCEAN that drydocking and "sub-details" were ever agreed upon or were expressly left to be agreed at a later time but only that those outstanding terms were not sufficiently material to prevent the formation of the alleged charter.

8. *Assertion*, p. 9:

> "both of these items [drydocking and sub-details'] are reflected in the fixture telex." (App. 65a, pp. 21-25).

Fact: To the contrary, it is uncontested that the so-called fixture telex omitted mention of "sub details." Elsewhere in its Brief, at pages 27 and 31, INTEROCEAN concedes this disparity and attempts to rationalize this very material omission as a mere clerical error of no significance.

9. *Assertion*, p. 10:

> "With respect to the clause of the telex dealing with the guarantee, Spears testified that National was to issue a guarantee of the charterer's performance." (R. 303)

Fact: Spears' testimony at R. 303 was: "This was my understanding, but it isn't clear." Elsewhere Spears testified that NATIONAL's accountants "have advised us against giving guarantees of this nature." (R. 251)

10. *Assertion,* p. 11:

> "[The preparation of the *pro forma* time charter form] . . . was meant only to give the parties a chance to examine a completed document and make certain that there are no later changes which they might wish to include." (R. 36, 124-25)

Fact: The actual testimony of DeSalvo relevant to this point at the cited pages of the record was as follows:

> "*Well, we started to work on the terms of the charter that had not been completely agreed.*" (R. 36) [emphasis ours]
>
> "This is a working copy, we refer to it, of the charter party. It is typed up by our office, the terms as we have them, with copies sent to both principals, the charterer and the owner, for them to look at.
>
> "Assuming that they agree, then the final copy will be typed for signature." (R. 125)

11. *Assertion,* p. 11:

> "Mr. DeSalvo clearly testified that he received specific authority from Mr. Theodoracopulos over the telephone to attempt to negotiate a sub-charter." (R. 37-39, 145, App. 65a, p. 24)
>
> "Mr. Theodoracopulos admitted that Mr. DeSalvo advised him of a possibility of chartering the OSWEGO RELIANCE to Chevron." (R. 222-223)
>
> "Pursuant to the authorization which had been received from Mr. Theodoracopulos, Poten contacted the chartering department at Chevron and told them they could offer the OSWEGO RELIANCE and told the Chevron people the size and description of the ship."

Fact: The discussion between DeSalvo and Theodoracopulos and the inquiry made to Chevron by Poten does not evidence that a firm offer for a sub-charter was made on behalf of NATIONAL. DeSalvo's testimony (App. 65a, p. 24) was that Poten "attempted to do so . . . We said we can get such a vessel as described . . . I personally did not talk to these people." Nor were any notes kept of Poten's call to Chevron. See Respondent's Main Brief, pp. 54, 55.

12. *Assertion*, p. 15:

> "That same day [March 24, 1971], DeSalvo prepared a draft form of the guarantee to be executed by National . . . The guarantee had not been prepared at the time the *pro forma* charter party was prepared [March 19, 1971] because the guarantee was to be in the form of a separate agreement." (R. 123, 171-2)

Fact: First, evidence is lacking as to exactly when DeSalvo prepared the guarantee. But if as INTEROCEAN claims, DeSalvo did not prepare the form of guarantee at the same time he prepared the *pro forma* and conferred with Germano, we suggest it was because DeSalvo did not then have a concluded charter in view of the numerous terms which remained to be agreed upon. There is, however, no testimony that DeSalvo prepared the form of proposed guarantee on March 24, 1971. In fact, although he passed copy of the proposed form of guarantee to Germano, no form of guarantee was ever transmitted or read to either NATIONAL or Theodoracopulos, a fact DeSalvo was at a total loss to explain. See Respondent's Main Brief, pp. 48, 49.

Second, the proposed form of guarantee was drawn not for execution by NATIONAL but by Theodoracopulos indi-

vidually, a fact which petitioner has utterly failed to deal with in its Brief. See text, Respondent's Main Brief, p. 50.

Third, the record contains nothing to bear out the assertion the guarantee was not prepared or sent at the same time as the *pro-forma* "because . . . [it] was to be in the form of a separate agreement." In fact, the furnishing of "an appropriate guarantee" was made an express condition of the charter negotiations by INTEROCEAN. See Respondent's Main Brief, pp. 48, 49.

13. *Assertion,* p. 15:

> "In clause 11 [of the final form of charter party executed by Interocean] the drydocking provision originally proposed by Interocean in the *pro forma* was deleted and the clause suggested by Mr. Spears was inserted."

Fact: DeSalvo's notes reflect the following language given to him by Spears on the afternoon of MARCH 23. That language was never transmitted to INTEROCEAN until after Respondent withdrew from negotiations (R. 265):

> "Charterer will do all possible to position the vessel for 15 days in the U.K., Med. or Far East so that drydocking can be accomplished between October 15/December 15, 1971." (App. 61)

By contrast, the actual clause in the final form of charter party executed by INTEROCEAN read:

> "Vessel requires drydocking fourth quarter 1971 for approximately 15 days. Charterers will give owners as much advance notice as possible so as to position vessel in order to coordinate drydocking during this period." (App. 75, p. D.5)

14. *Assertion,* p. 16:

> "A little later in cross-examination, Spears indicated also that the primary concern on his mind was not the OSWEGO RELIANCE charter, *which he presumed to have been fixed,* but he was concerned about *the* subcharter of the vessel in the Persian Gulf. *Referring to the anticipated subcharter to Chevron,* Spears testified: (R. 310)
>
> 'We had not concluded this charter. We had to conclude *the* subcharter and give instructions to the Captain by the end of the week, when it appeared that the spot market in the Persian Gulf showed a weakness.'" [emphasis ours]

Fact: First, the quote from Spears' testimony contains a typographical error which was missed in compiling the stipulated corrections to the transcript: "the subcharter" should read "a subcharter". Second, there is nothing in the record whatever to support the assertion that Spears on March 23, 1971, the date mentioned in his testimony ever presumed the OSWEGO RELIANCE was already fixed and was only concerned about an anticipated subcharter to Chevron. Such contention is clear fabrication, where the record is utterly devoid of any evidence that from March 18 through the withdrawal of Respondents on March 24 there were any negotiations going on between Respondents and Chevron or anyone else for a subcharter of the OSWEGO RELIANCE or that Chevron's possible interest in spot chartering the vessel continued after INTEROCEAN disclosed on the 18th, what it had neglected to previously, that the vessel was not enrolled in TOVALOP. Third, Spears' own words, "We had not concluded this charter" belie any serious claim that "he presumed" the vessel "to have been fixed." Moreover, the portion of the transcript immediately preceding

the quotation which INTEROCEAN has lifted utterly out of context, reads:

> "Q. You testified, I believe, that you were quite worried about the market on March 23rd. A. That is not correct. I'm sorry. You missed my point, then. I said that I was concerned about the ship arriving in the beginning of the following week. We had not concluded this charter, etc." (R. 310)

Plainly, Spears' concern was that in the absence of a concluded charter and the "prompt" arrival of the vessel at the Persian Gulf on April 1, "with the way that these corporations move, so slowly . . ." (R. 264) respondents would lack sufficient time to find spot employment for the vessel were a charter with INTEROCEAN to be concluded.

15. *Assertion*, p. 17:

> "He [DeSalvo] explained that the earlier *pro forma* draft (March 19) had been mailed because at that time there were no problems in the negotiations." (R. 172)

Fact: This is severely misleading. The evidence is clear and uncontradicted that on the 19th, before DeSalvo even mailed the *pro forma* DeSalvo had advised Theodoracopulos that INTEROCEAN was not willing to enter the vessel in TOVALOP and Theodoracopulos told DeSalvo that HELLENIC would not take the vessel without such coverage. (R. 225-26) That there were indeed problems on March 19th is evident from the full context of the very testimony relied upon by INTEROCEAN.

> "Q. By the way, why did you send the charter by mail on a Friday knowing it wouldn't get there until Monday. A. Standard procedure.

Q. Well, on the 25th you sent it over by hand. A. Obviously by the 25th there were some problems.

Q. There were no problems on the 19th? A. Not as far as sending the working copy. It is fairly standard to have still some clauses that are under discussion when you send a—

Q. You agree that there were clauses under discussion on Friday the 19th, then. A. Yes, there were.

Q. *The fact of the matter is, isn't it, that on Friday the 19th neither party knew exactly what they would be signing, if they were going to sign anything? A. That is correct.*" (R. 177-8) [emphasis added]

16. *Assertion,* p. 18:

"Drydocking is an item for the owner's account. The vessel is off hire during the time she is drydocked, and if the vessel has deviated from its normal trading routes to reach the drydocking port, the deviation time and expenses are also for the owner's account (R. 42-45, 141, 176)."

Fact: INTEROCEAN omits to add that during the period of deviation while the vessel may be off hire for the owner, she would be earning nothing for the charterer as well. Any substantial period of deviation to the "guaranteed" place of drydocking demanded by INTEROCEAN when added to the approximately fifteen (15) days which it was contemplated the vessel required for the actual drydocking itself, could have placed the vessel off hire for a material portion of the one year plus or minus 30 days for which the vessel was to be employed by HELLENIC. See Respondent's Main Brief pp. 22-34.

17. *Assertion,* p. 19:

"This [Interocean's requirement that the vessel drydock in Iberia or Japan] was passed along to charterer

who initially objected to the location of the drydocking, but on March 24, themselves proposed a clause accepting drydoc ing in Iberia and Japan which they felt would be acceptable. This clause was subsequently accepted by owners. This indicated clearly that the established pattern that drydocking would be agreed to as a result of subsequent negotiations was met in this case." (R. 42-45)

Fact: This statement is shockingly at variance with the evidence as is borne out by R. 42-45 and the proposed clauses in question quoted herein at p. 8. Spears' proposed language, which as we have indicated was never given by DeSalvo to INTEROCEAN until after negotiations were terminated on March 24 does not contain any agreement by Respondents to specifically drydock the vessel in Iberia and Japan. More significantly, the clause belatedly and unilaterally inserted by INTEROCEAN in the form of charter party which it executed not only does not follow Spears' suggested language but also does not mention any geographic location at all, much less Iberia or Japan.

18. *Assertion*, p. 20:

"DeSalvo testified that there was no industry custom as of that time for a requirement that a vessel be enrolled in Tovolop for it to be chartered to major oil companies. According to DeSalvo, some of the major oil companies did require a vessel to be enrolled in Tovalop before they would require it, but this was not true of all the major oil companies." (R. 147-8)

"Q. Didn't you also say that no major would accept a vessel without TOVALOP entry? A. No, I said it was becoming a situation where more and more of the majors were requiring that the vessel be entered in TOVALOP." (R. 148)

The fact that TOVALOP may not, in March 1971, have been universally required by all the major oil companies as is now the case is immaterial, where DeSalvo himself acknowledged that more and more of the companies were requiring it. Undisputably, TOVALOP was a major item.

19. *Assertion,* p. 21: [Summarizing the testimony of owner's "expert" witness Gorrissen on the drydocking clause]

> "He stated that the custom in the industry is for a fixture to be concluded without settling the drydocking clause. The broker quite often puts his wording in the charter party, detailing what he thinks is beneficial to both parties. This is done after the fixture is concluded and is not considered a difficult clause. He said it is not a major feature of the charter party." (R. 319)

Fact: The distortion present in this paraphrase is evident from comparison with Gorrissen's actual testimony on this point:

> "Q. When would that be worked out in your understanding of the chartering business? A. *Well, it usually is worked out before the charter is signed* and it is quite common that it is considered a detail where the broker, quite often he puts his wording that he thinks is beneficial to both parties in there and it is my opinion that it is not considered a big difficult clause." [emphasis ours] See Respondent's Main Brief, pp. 31-34.

20. *Assertion,* p. 23:

> "... [H]e [Porvancher] conceded that he knew the Bethlehem fleet was self-insured." (R. 75-6)

* * * * *

"He [Ferris] also stated that he was familiar with the fact that Bethlehem was a self-insurer. . . . " (R. 348-9)

Fact: [Porvancher on cross:]

"Q. Are you familiar with the Bethlehem Steel fleet? A. I know of the Bethlehem Steel fleet, yes, Sir.

Q. That is self-insured. Is it a self-insurance plan? A. I don't know." (R. 74)

* * * * *

[Ferris on cross:]

"Q. You are familiar with the fact that Bethlehem has a self-insurance policy, are you not? A. I have heard the testimony in the trial to that effect.

Q. You have dealt with Bethlehem before, haven't you? A. It is not an item that has been in the forefront of my mind, I'm afraid. Maybe I heard of it. It may have been something that I remembered when I was active." (T. 348-9)

21. *Assertion*, p. 23:

"Mr. Ferris stated that it was customary in the trade for both owners and charterers to take notes on the offers and counteroffers that are passed back and forth prior to the fixture. . . . " (R. 350-1)

Fact:

"Q. When you make such an offer you write it down, don't you? A. No, I generally would give it to a broker and let him handle the writing. If you are talking, for example, of a single voyage, this is not done with written communications or telex communications. It is done over the phone and you do not keep any notes of that nature.

Q. But if you are dealing, say, with a 10-year charter— A. Then you would be building up a record, yes.

Q. And with a one-year charter you would keep notes, would you not? A. You'd keep some notes, yes." (R. 350-1)

22. *Assertion,* p. 12:

"He [Ferris] also stated that if you receive a telex, it should be read over very carefully and that if there is disagreement as to the terms of the telex, *a reply telex should be sent immediately. . . .*" (R. 350-1) [emphasis ours]

Fact:

"Q. Is it good practice when you get a message to acknowledge it, and, if you disagree with it, to state wherein you disagree? A. That would really depend on the circumstances. If, for example, if it were I who was in the office at that time, I don't operate a telex and if I had nobody to give it to and had tried unsuccessfully to communicate, I would let it go 'til the next morning." (R. 351)

Like Ferris, neither Spears or Theodoracopulos knew how to operate a telex. They did attempt to call DeSalvo on the evening of the 17th and Theodoracopulos did reach DeSalvo on the morning of the 18th to protest the telex. The fact that Theodoracopulos used the telephone is hardly unusual where both NATIONAL's and Poten's offices are in New York City, he and DeSalvo were quite close and did most of their business with each other by telephone.

23. *Assertion,* p. 24:

"Theodoracopulos, in fact, testified that he had made notes about the OSWEGO RELIANCE, but had thrown them out even though the matter had been referred *by him* to counsel prior to his destruction of his notes." (R. 235-7) [emphasis ours]

p. 28:

"Mr. Theodoracopulos, of course, had destroyed his notes after the dispute was referred to *his* attorney, and there was evidence that his memory may have been incomplete." (R. 234) [emphasis ours]

p. 45:

". . . the Court found DeSalvo's testimony to be credible. These reasons [for such finding] have been set out various times above in the brief, and rest primarily on Theodoracopulos' somewhat unbelievable testimony that he threw his contemporaneous notes away *after he had conferred with his counsel.*" [emphasis ours]

Fact: We take it that what is intended to be conveyed by the last quoted sentence is that the Court was justified if it rejected Theodoracopulos' testimony because he had deliberately destroyed contemporaneous notes "after he had conferred with his counsel". This is a wholly unfounded charge against the witness and counsel consulted by NATIONAL on March 24, *the day after Theodoracopulos departed for Colorado on vacation.*

Exhibit J (NATIONAL's original of the so-called fixture telex of March 17), shows that a copy was sent, on March 24, to one J. Poles. (John Poles is a well-known member of the admiralty bar of this city.) Theodoracopulos testified, however, that he left on his vacation to Colorado on March 23 while negotiations were still going on and that Spears took over the matter. In clearing his desk either he or his secretary had thrown away the secretarial pad notebook in which he had kept whatever notes he had made of his talks with DeSalvo.

"A. As soon as the notebook is filled, you know, it is thrown away like everything else, daily correspond-

ence, daily Telex that we are finished with or cables that we are finished with.

Q. Did anybody tell you to keep your papers for this litigation, a possible litigation? A. When? What day are you talking about?

Q. Any time did people tell you to keep your records for possible litigation? A. After the case started becoming—lawyers started coming into the case—I was told to produce any notes that I had. I told them I couldn't find them, I didn't have them.

Q. When was that? A. This must have been after I came back from vacation.

Q. What day? A. I came back from vacation, let's see, either the first or the second week in April.

Q. And you cleared your desk then? A. Either I or my secretary cleared my desk.

Q. Isn't it true that this case went to the lawyers the 24th of March? A. I had left New York on Tuesday, New York time, and was in Colorado.

Q. But you know, being a vice president of the company, don't you, when the company first consulted counsel? A. No, I don't.

Q. I ask you to look at the top of Exhibit J. Doesn't that say that that Telex went to one J. Poles on March 24? A. When the president of the company handles the case on my departure I don't see that I have to communicate with him about it.

Q. Doesn't that indicate that that message went to a lawyer on March 24? A. This does, yes." (R. 236-37)

Obviously, Theodoracopulos not only did not confer with counsel on the 24th but was even unaware that NATIONAL had contacted counsel.

The misguided notion, shared by the Court, (App. 57) that Exhibit "J" was somehow sent "by him" [Theodoracopulos] to counsel and that Theodoracopulos as a con-

sequence purposefully threw away his notes is completely without foundation.

If, as INTEROCEAN contends, it was this inference which "primarily" led the Court to disregard the testimony of Theodoracopulos, then there was reversible error of the first magnitude which may well have discolored the Court's entire apprehension of the testimony of Theodoracopulos in this case.

24. *Assertion*, p. 28:

> "Mr. DeSalvo further testified that Mr. Theodoracopulos never protested the fixture telex or its terms, but discussed only the general market in the telephone call." (R. 35, 139, 141)

Fact:

> "Q. Do you remember what you said to him and what he said to you? A. No, I do not.
>
> Q. You have no recollection at all? A. I believe I probably asked to make sure he got the telex but other than that I don't believe I remember.
>
> Q. You don't remember what he said to you either? A. No, I don't." (R. 139)

25. *Assertion*, p. 31:

> "Spears, National's President strongly implied that the fixture contained all the terms which seemed material to him: (R. 225)*
>
> The Court: 'So that you had no complaint then to make on the terms of the fixture with relation to either speed or bunker consumption?'
>
> The Witness: 'In fact, I had no complaint at all . . .'"

---

* Should read (R. 255).

Fact: This quotation is taken thoroughly out of context. The context related solely to "the terms of the fixture with relation to either speed or bunker consumption." The remainder of the answer omitted by INTEROCEAN reads:

> "The question was to make sure that the representation made was entered in the charter party so that if the ship did not perform we could then reduce the charter hire, and this is the reason for which we had said that the performance of the ship would be reviewed after six months or if we have a claim we wouldn't wait until the end of the charter, we would get to it before." (R. 255-56)

26. *Assertion*, p. 33:

> "He [Theodoracopulos] did not object to the trading limits. (R. 35)
>
> * * *
>
> There was substantial evidence for DeSalvo's notes and testimony that Theodoracopulos did not protest the error and may not even have noticed it. (App. 61a, R. 35, 139, 141)"

Fact: Theodoracopulos' testimony as to his reactions on this point on receiving INTEROCEAN'S *pro forma* on Monday, March 22nd, were as follows:

> "Q. What did you do when you got the pro forma charter party on Monday? A. Well, I started looking it over, but sort of in a halfhearted way, because we were still apart on two major details which it looked to be almost impossible to solve. So I just gave it a cursory look, noticed—made a few notes on a few more points and passed these points on to Mr. DeSalvo.
>
> Q. What did you say to Mr. DeSalvo after you received the pro forma and what did he say to you? A. Well, I objected first to his delivery range. I wanted the Red Sea included in that. *Then he had an exclu-*

sion of Communist countries and I told him that I would agree to, of course, exclude at that time Cuba and Red China but I would want to have Yugoslavia and Poland because these were countries where Liberian vessels did call." (R. 227) [emphasis ours]

See also pages 34 and 35 of Respondent's Main Brief.

27. *Assertion,* p. 34:

"The Record reveals that Theodoracopulos knew what the original trading limits were, and the Court so found. (App. 45a)"

Fact: The Court's finding was:

"Upon receipt of the charterparty on March 22, H.T. called DeSalvo and asked him to modify two clauses; to broaden delivery range to the Red Sea, which was agreed to by owner; and to permit trading with Communist China, which could not and was not agreed to by owner because the crew of the vessel was Nationalist China [sic]." (App. 45a)

28. *Assertion,* p. 37:

"... the real reason for the repudiation of the charter is a break in the market ... Such was the case here. (R. 51, 263, 310)"

Fact: The record does not bear out this speculation. See infra, page 21; also Respondent's Main Brief, pages 71 and 72.

29. *Assertion,* p. 40:

"In this case, National's President, Spears, testified that National was in the business of guaranteeing its subsidiaries and affiliates. (R. 253)"

Fact: The relevant testimony of Spears on this point was as follows:

> "The Court: Did you see anything unusual about the appropriate letter of guarantee phrase or is that the usual expression found?
>
> The Witness: We had made a guarantee—when I say we, National Shipping had made a guarantee at one time some years ago to another shipowner and I had taken this matter up with our—
>
> The Court: You told us that you took it up with your lawyer or accountant.
>
> The Witness: Yes.
>
> The Court: You missed the purport of my question. Had you seen an expression like this, 'With appropriate letter of guarantee,' in fixtures or teletypes before that, before the date that you saw this in this case?
>
> The Witness: I don't think so, your Honor."
>
> * * *
>
> "The Court: So this was not unusual?
>
> The Witness: The guarantee is unusual. It does not appear in this type of fixture or charter party." (R. 252-254)

30. *Assertion*, p. 47:

> "The Court was also on firm ground in concluding that the break in the market, and the subsequent loss of the speculative value of charterer's venture *was the real reason* that they cancelled the contract." [emphasis ours]

Fact: The Court made no such explicit finding. Its resort to market rates which were not in evidence (App. 50a) has been cited as reversible error at page 71 of Respondent's Main Brief.

31. *Assertion,* pp. 47-48:

> ". . . there was testimony in the Record from which the Court could properly conclude that the fixture was reported in publication used in the shipping trade within three or four days after its fixture on March 17, 1971. The evidence occurs in the cross-examination of Thomas Spears. (R. 511) Mr. Spears was cross-examined with reference to these publications. He was asked if he was familiar with Charles I. Webber Company. He stated that he knew of them. When asked if they received their reports, he stated that they receive them only recently. He was asked if he received *Maritime Research Reports.* He said no. He was asked if he read the *Journal of Commerce.* He stated he did. He was asked if he knew that the fixture of the vessel was reported in the *Journal of Commerce,* Monday, March 22. To that he stated he did not know. He was asked if he made any note of that, and he said he did not remember reading it in the *Journal of Commerce.*
>
> The Court had the opportunity throughout this cross-examination of examining the demeanor of the witness on the stand. From its observation of the demeanor as the witness was cross-examined as to these trade publications, the Court could conclude that the witness was not telling the truth, and that the fixture had been reported to the trade."

Fact: This is a thorough *non sequitur.* The basis for this assertion was the following:

> "Q. Do you read the Journal of Commerce? A. Yes, I do.
>
> Q. Did you know that the fixture of the vessel was reported in the Journal of Commerce Monday, March 22nd? A. I didn't know." (R. 311)

As we have pointed out at page 71 of Respondents' Main Brief, there is no evidence in the record or even an offering that the so called "fixture" was reported in any trade publication. Had such publication been offered it would have been inadmissible. *Castillo* v. *Argonaut Trading Agency*, 1959 A.M.C. 179, 187 (S.D.N.Y. 1958). But whether the alleged "fixture" was published or not, there was no evidence that it was ever reported by Respondents.

In the absence of any evidence whatever concerning the alleged report of "fixture" or its source, the arbitrary and thoroughly erroneous finding in this regard of the Court below cannot be sustained upon the record or now justified by invoking the matter of credibility.

We submit that the glaring extent to which INTEROCEAN has felt compelled to misstate and distort the record underscores that the evidence does not sustain the opinion below and that the findings and conclusions of the District Court were clearly erroneous. By its resort to such distortions INTEROCEAN tacitly concedes that it failed to meet its burden of proof that there had been a meeting of the minds as to all essential terms of the charter under negotiation on March 17, 1971.

POINT II

INTEROCEAN'S CONTENTION THAT THE ALLEGED "FIXTURE NOTE" WAS "CONCLUSIVE EVIDENCE" OF A CHARTER IS UNSUPPORTABLE WHERE MATERIAL TERMS WERE MISSTATED OR REMAINED TO BE AGREED UPON.

A. The Cases Relied Upon By Interocean To Show That A "Fixture Note" May Be Sufficient To Bind A Charter Do Not Support The Finding Of A Binding Agreement Here.

INTEROCEAN relies upon *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978 (2 Cir., 1942) for the proposition that a fixture note which fails to set forth all of the material terms is nevertheless sufficient to bind a charter. Such reliance is sorely misplaced. In *Kulukundis,* unlike the instant case, there were no reservations specified in the negotiations. All the material terms had been agreed to, although three terms were omitted by oversight from the fixture slip itself and others were incorporated by reference from an earlier charter. Here, on the face of the alleged "fixture telex" itself, the matters of drydocking ("SUITABLE DRYDOCK CLAUSE TO BE WORKED OUT FOR NOVEMBER DRYDOCKING"), and of the furnishing of a guarantee ("WITH APPROPRIATE LETTER OF GUARANTEE"), were expressly left open. What was omitted by the eager broker DeSalvo was that the parties had throughout specified a further condition, namely, that the negotiations were "sub-details", i.e. subject to agreement as to the remaining details of the charterparty form. In contrast to *Kulukundis,* there was plainly no agreement in this case as to drydocking, the guarantee, delivery and trading range insurance including TOVALOP, speed and performance and

the penalty for under performance as well as the mode of payment of hire, all material terms. Further, there was material non-disclosure as to insurance and the inability of the vessel, notwithstanding the alleged "fixture telex", to trade with *any* communist country. The attempted analogy to *Kulukundis* is wholly inapposite.

In *Aaby* v. *States Marine Corporation,* 181 F.2d 383 (2d Cir. 1950), the question on appeal was whether a breach of warranty of seaworthiness was sufficient to frustrate the purpose of a charter so as to warrant repudiation by the charterers. No question whatever was raised as to the sufficiency of a fixture note or as to the existence of the charter party itself.

In *Dover* v. *Summit Industrial Corporation,* 148 F. Supp. 206 (S.D.N.Y. 1957), it was undisputed that the charterers actually executed a "Gencon" form of charter party containing an arbitration clause and there was no contest as to either the terms of the charter party or the fixture letter which had preceded it. The question there as in *Aaby, supra,* was only whether owners' breach of an express warranty in an existing charter justified repudiation by charterers.

In *Gardner* v. *The Calvert,* 253 F.2d 395, 398-399 (3d Cir. 1958), no question of a fixture memorandum was involved. The Court merely upheld a parole charter after charterers put equipment and a crew aboard the vessel without protest by owners. The owners then attempted to compel charterers to execute a written form of charter inconsistent with the agreed oral terms and upon the charterers refusal, repudiated the charter.

In *Orient Mid-East Lines* v. *Albert E. Bowen, Inc.,* 458 F.2d 572, 574 (2d Cir. 1972), no charter or fixture was at

issue. The case involved a simple booking note for the carriage of 10 dump trucks. Although there was conflicting testimony as to whether the matter of on deck stowage had been discussed at the time of the booking, it was undisputed that the forwarder did not take any exception to the booking note containing such term. Under those circumstances the forwarder was held bound to the oral booking. By contrast in the instant case, the negotiations between the parties actually continued for almost a week after the broker sent the so-called "fixture" telex, two materially different versions of the alleged charter were prepared and the broker's notes and subsequent telex exchanges between the parties evidence the clear absence of an agreement as to material terms. *Superior Shipping Co.* v. *Tacoma Oriental Line, Inc.*, 274 F. Supp. 25 (S.D.N.Y. 1967).

INTEROCEAN also places great reliance on *Christman* v. *Maristella Compania Naviera*, 349 F. Supp. 845 (S.D.N.Y. 1972) aff'd without opinion 468 F.2d 620 (2d Cir. 1972). *Christman* is thoroughly distinguishable on its facts from the case at bar. There, the negotiations were conducted between principals and brokers operating under the well understood rules of the Baltic Exchange at London. The owners managing agent, Morland, acting through one Capt. Maris, specifically authorized a London Cable Broker, Houlder, to conclude a fixture and execute a charter for a single voyage subject to the conclusion of certain terms found to have later been agreed upon. The formal charter party was executed for Houlder by Boyd, its New York cable correspondent, and owners sought to repudiate claiming Boyd's lack of authority and misstatement of certain terms held *not material to the bargain.* Not only had Maris

actually conceded the existence of the fixture but the Court referring to the authority given to Houlder went on to note:

> "At this meeting Captain Maris authorized Houlder to fix the SS ERETREA on terms discussed at the meeting and to negotiate respecting modification of charterer's last offer as to freight, and to fix the vessel upon reaching agreement."
>
> • • •
>
> "I infer and find from the entire record before me that Morland, acting through Captain Maris, actually authorized Houlder to have the charter party signed in New York by Boyd." *Christman, supra,* 349 F. Supp. 845, 851, 853.

In *Christman,* there was an explicit and undisputed delegation of authority to Houlder to negotiate and conclude a charter. In contrast to Houlder, DeSalvo in this case was a broker simply relaying offers and counter-offers. (R. 151-154) Where Houlder had express authority with discretion to complete the negotiations of the remaining charter terms, no such discretion to supply missing or not agreed upon terms was ever extended to DeSalvo here. The alleged "fixture" telex itself contained two specific reservations as to material terms and DeSalvo's notes unquestionably show that both INTEROCEAN and Respondents at all times specified that the negotiations were subject to the further limitation of "sub-details". Such limitation was never waived. Moreover, in *Christman,* which involved a single voyage sugar charter, the misstated terms were minor. In sharp contrast, the misstated and outstanding items for the one year $3,500,000 time charter under negotiation here included among other terms drydocking, trading limits, delivery range, insurance and protection against oil pollution, speed and performance and the question of a guarantee.

It is instructive that both *Christman* and *Orient Mid-East Lines* v. *Bowen* involved but a single voyage or carriage. Much more in point to the one-year charter under negotiation here are *Orient-Mideast Great Lakes Service* v. *International Export Lines,* 315 F.2d 519 (4th Cir. 1963), which involved negotiations for a 12- to 15-month time charter (summarized and cited at pages 52 to 54 of Respondent's Main Brief) and *Uninav S.A. and Federal Commerce and Navigation Co. Ltd.* v. *Molena Trust, Inc.,* 1973 A.M.C. 1386 (S.D.N.Y. 1973) recently aff'd without opinion by this Court. (Docket 73-2076, February 7, 1974). Both cases show that the absence of agreement by the parties to even a single material term precludes the formation of a charter and that materiality is to be measured not only *objectively* from industry practice itself, but also *subjectively* from the importance the parties themselves attach to the term by their conduct.

In *Orient-Mideast Great Lakes Service* v. *International Export Lines,* lack of agreement as to the allowable quantity of water and stores was found sufficient to prevent formation of a charter where that term was found to have been deemed important by the parties.

In *Uninav,* the negotiations were for a two-year and three-month time charter with an option to renew for an additional 3 years and 3 months. There, charterers' telex commenced in much the same manner as the broker's in the case at bar by proclaiming "We charter the ALIDA GORTHON as follows: . . . ".

Owners replied two days later confirming "contents of your telex as being correct", noting "that option for three years on vessel must be in total covering all four

ships" and stating "It is imperative that we have an agreement between us on overtime . . .". Charterers replied agreeing to the option term and stating "It is also understood that as far as the overtime is concerned, we will endeavor to cooperate with you and sit together with you on this question at a later date if the option is declared." Later, charterers sent a draft of the proposed charter for execution to which owners responded by sending a telex proposing certain changes.

On these facts, the Southern District found that the purported fixture did not evidence a "meeting of the minds" as to all material terms.

> "The record reveals that as of July 7, 1972, after the meeting and exchange of telexes, there were several issues left unresolved. The rate of overtime on the extension of the three existing charter parties and on the new charter party for the ALIDA GORTHON is a major area not resolved. Other items include insurance rates, restricted areas of travel, speed and fuel consumption. It is basic contract law that a contract is made when the parties have agreed upon all material terms. CORBIN ON CONTRACTS, Vol. 1, section 82, p. 349; section 95, p. 394. Thus, the Court is confronted with the issue of whether or not, in the context of negotiations for a charter party, an agreement on overtime is a material term, without which there is no contract."
>
> * * *
>
> "Further, according to the telex from plaintiffs to defendant on July 7, 1972, it is clear that overtime had not been settled, and that plaintiffs were in no hurry to settle it, in that they appeared to think it wasn't necessary to settle unless and until they exercised their options. Thus, from this telex it is apparent that no overtime was agreed on which could be made part of a binding charter on the ALIDA GORTHON as of July 7,

1972. It is also clear that there was no meeting of the minds of the parties, in that from the evidence one can conclude that the defendant wanted a higher overtime rate for the ALIDA GORTHON charter which would be effective immediately, and also for the three other ships, when the new options could be acted upon. Plaintiffs, by their June 7, 1972 telex, seemed to feel that overtime with reference to any or all the vessels was not an issue unless and until they exercised their options.

Although there is testimony that eventually, subsequent to the July 1972 negotiations, there was agreement as to overtime, speed, fuel consumption, trading limits, insurance, etc., there is no documentary evidence to substantiate an agreement concerning overtime rates, and new and different issues constantly arose between the parties, so that by May of 1973 no formal charter party had been signed by the parties. Although the Court does not feel that it was absolutely necessary to have a signed charter party in order to assume there was a binding contract, it does determine that, upon all the evidence presented, a meeting of the minds of the parties on all material terms had not occurred in July of 1972, and that to date there is no binding contract." 1973 A.M.C. 1386, 1389-90.

In the instant case, the terms not agreed upon are far more material than the allowance for water and stores in *Orient-Mideast* v. *International Export Lines* or allowance for overtime in *Uninav*. In the absence of a meeting of the minds as to material terms of drydocking, trading limits, delivery range, other details of the proposed charter and the guarantee, there was clearly no binding agreement.

B. The Variations Between The Oral Negotiations And The Alleged "Fixture" Were Not Mere "clerical errors" And Evidence The Absence Of A Meeting Of The Minds As To Essential Terms.

The omission of "sub-details" from the alleged "fixture" telex was not, as Interocean asserts, a minor error of no significance to the bargain. (See pp. 36-38 of Respondents' main brief.) De Salvo himself acknowledged that such omission was important. (R. 111) In fact, he testified that the details of the "Mobiltime" form could not be completed unless there was agreement by the parties on the remaining terms. (R. 109-110) He further conceded that "sub details'" meant more than "mere filling in the blanks of the form", and the uncontradicted testimony of Theodoracopulos, Spears and Ferris was that the limitation on negotiations of "sub-details" means subject to working out the details of the charter. (See Respondent's Main Brief, pp. 36-38.)

Interocean also asserts that the omission of the phrase "all Communist controlled countries" from the alleged "fixture" telex was similarly of no economic significance. That is hardly the case as such omission affected the vessel's trading limits, an item which INTEROCEAN'S own "expert" Gorrissen conceded to be a major term. (See Respondent's Main Brief, pp. 34-35.)

C. Drydocking, Trading Limits, Delivery Range, Insurance, TOVALOP And Speed And Performance Were Material Terms Of The Proposed Charter And Had Not Been Agreed To.

The facts supporting the absence of a meeting of the minds on these material terms were examined at length in Respondent's Main Brief at pp. 21-57 and require only brief discussion here.

1. Drydocking.

There was no agreement as to a drydocking clause prior to the withdrawal of respondents from negotiations on the morning of March 24, 1971. At the time of such withdrawal, INTEROCEAN had not wavered in its demand for a guarantee of the vessel's position for November drydocking in Portugal, Spain or Japan, and Spears' proposed counter had not been passed by DeSalvo to INTEROCEAN. Moreover, the language in the form of charter party actually executed by INTEROCEAN on March 25, was not that suggested by Spears. (See P. 8 *supra.*)

2. Trading Limits.

The alleged "fixture" telex contained the following language as to trading limits:

> "TRADING WORLDWIDE WITHIN IWL EXCLUDING COMMUNIST COMMUNIST CONTROLLED CHINA, NORTH VIETNAM, NOR. KOREA AND CUBA."

DeSalvo's notes, however, of INTEROCEAN's offer and the language which he was later to include in the *pro forma* of the alleged charter read:

". . . trading worldwide within Institute's Warranty Limits excluding China, North Vietnam, North Korea, Cuba, Israel and all other communist countries".

If DeSalvo meant to include in the "fixture" telex the words "Israel and all other communist countries", the typographical error by which INTEROCEAN claims, those words were omitted would have occurred after the word "Cuba", and not after "communist". It is not unreasonable to conclude then that DeSalvo intentionally left out "Israel and all other communist countries" when he prepared the telex in the belief that the parties would agree on the exclusion of only China, North Vietnam, North Korea and Cuba which were the only customary exclusions for Liberian flag vessels such as the OSWEGO RELIANCE. INTEROCEAN, however, was not prepared to agree to only those customary trading restrictions as the OSWEGO RELIANCE had a Nationalist Chinese crew and could not trade with any communist country, a fact not disclosed to Respondents.

3. *Delivery Range.*

According to DeSalvo, the purpose of the "fixture" telex was to set forth the terms so that if it did not accurately reflect the negotiations the parties could so advise (R. 184). As to delivery range, Theodoracopulos was clearly not in agreement with the telex, objected about it to DeSalvo and instructed that he wanted the Red Sea included (R. 227).

4. *Insurance.*

INTEROCEAN asserts that it was justified in instructing DeSalvo to delete Clause 23 of the "Mobiltime" form, which required the vessel owner to have Protection and Indemnity ("P&I") insurance entry, "because Theodoracopulos had

never inquired about it . . . " and it was " . . . not part of the bargain on March 17, 1971". (p. 34 of INTEROCEAN'S Brief) If so, then we see no reason for distinguishing the insurance clause from any other clause in the "Mobiltime" form and the parties were free to bargain after March 17 on each and every clause not theretofore specifically discussed. The findings of the Court below that all material terms of the alleged charter had been agreed to is therefore clearly erroneous and must be reversed.

When Clause 23 was not shown in the "fixture" telex as having been deleted, respondents had every right to believe that the warranty in the "Mobiltime" form that the vessel had a P&I entry was in fact true. INTEROCEAN, however, was not so insured and at no time during the negotiations did it agree to Clause 23. Patently, there was no meeting of the minds as to this essential term.

Further, INTEROCEAN'S claim that Respondents could have obtained their own insurance is illusory, as a charterer's concern is that *the owner* have P & I coverage against third party liabilities so that if such liabilities do arise, they will not operate to frustrate or prevent the vessel's performance of the charter. There is, in addition, nothing in the record to indicate that a charterer's P & I policy in any way protects the vessel or the owner against third party claims.

Finally, INTEROCEAN contends at p. 35 of its Brief that "Bethlehem's self insurance was adequate". That may be fine for Bethlehem but there is nothing in the Record as to what the assets of either INTEROCEAN or Bethlehem were or that Bethlehem was in fact ready, willing and able to underwrite all third party liabilities of the OSWEGO RELIANCE. Most of all, insurance was an item for HELLENIC

to properly consider in determining whether it would charter the vessel and in the negotiations with INTEROCEAN it was not for INTEROCEAN to unilaterally substitute its so-called "self insurance" for the P & I entry required by Clause 23 of the "Mobiltime" form.

In essence, there was material nondisclosure and the absence of a meeting of the minds as to insurance. INTEROCEAN had no P & I entry and no intention of obtaining one. Bethlehem's self-insurance program may not have been a secret in the industry but to have imputed such knowledge to Theodoracopulos and Spears, when DeSalvo who himself acted for Bethlehem, did not know of such arrangement, constituted overreaching by the Court below and is clear and reversible error.

5. *TOVALOP.*

TOVALOP is a standard P & I covered risk. (App. 71 p. B-4) In view of the necessity for P & I insurance against potentially vast liability for oil pollution and the requirement of such coverage by a preponderance of the major oil companies in the chartering market, there can be no doubt that TOVALOP was a major item of the insurance evaluation which it remained for the parties to discuss under "sub-details". (App. 65, p. 21). If the issue of TOVALOP did not come up on March 17, it was principally because INTEROCEAN failed to disclose that it had no P & I entry and Respondents, until receipt of the *pro forma* on March 22 containing the deletion of Clause 23, had no reason to believe that INTEROCEAN did not have such coverage.

6. *Speed And Performance.*

INTEROCEAN argues that the "blanks" in the "Mobiltime" form dealing with speed and performance and by implication the penalty for underperformance, were details which the broker had the authority to supply. To the contrary, speed and performance were vitally important economic items and the parties had both specified "Mobiltime subdetails", i.e., subject to agreement as to the details of the charter party form, reserving agreement on the details to themselves. Those terms were, according to DeSalvo, something which the broker did not customarily supply.

Certainly, it cannot then be seriously contended that these items were not major terms of the charter. Using the 25¢ figure unilaterally inserted by INTEROCEAN as the penalty for underperformance in Clause 2(d) of the *pro forma,* that measure alone amounted to $147,849 *per knot* per year, hardly an insignificant term.

POINT III

NATIONAL DID NOT AGREE TO GUARANTEE THE ALLEGED CHARTER NOR WAS IT A PARTY TO ANY AGREEMENT TO ARBITRATE.

A. National Did Not Agree to Guarantee the Alleged Charter.

The fact that DeSalvo had on one previous occasion procured a guarantee of Hellenic's performance is far different from the assertion that DeSalvo had implied authority to give a guarantee on behalf of National especially where DeSalvo himself disclaimed any such authority or agency. (R. 12, 151-52, 153-54).

Interocean has failed to point to a single authority which would sustain the holding of the Court below that a charter broker without explicit authorization is empowered to execute a guarantee on behalf of a charterer as ancillary to charter negotiations. Nor, has INTEROCEAN been able to point to any evidence adduced in the record to show that it is customary in the trade for brokers to do so.

In *Christman* v. *Maristella Compania Naviera, supra,* in contrast to the instant case there was actual and express authority given to the broker to negotiate and execute the charter. Such authority, however, did not extend to the giving of a guarantee.

INTEROCEAN goes so far as to now argue at p. 39 of its Brief that "[U]nder the law of New York, DeSalvo had the power to bind National in this transaction *even though he was not the agent of National.*" (emphasis ours.) As authority for such proposition INTEROCEAN relies upon *Cerp Construction Co.* v. *J.J. Cleary Inc.,* 59 Misc.2d 589 (Sup. Ct. 1958), aff'd 31 A.D.2d 784 (2nd Dept. 1969). That case,

however, turned upon a finding of a principal-agency relationship and in no way involved the question of the authority of a broker to give a guarantee for purposes of satisfying the Statute of Frauds (New York General Obligations Law § 5-701).

The alleged "fixture" telex itself is silent as to the terms of the guarantee, incorporates no other document by reference and does not specifically state that the guarantee would be that of NATIONAL. The words, moreover, "with appropriate guarantee" in the telex do not themselves constitute a guarantee. Accordingly, INTEROCEAN has failed to prove the requisite direct and express evidence of the intention and agreement by NATIONAL to give such guarantee. *Savoy Record Co.* v. *Cardinal Export Corp.*, 254 N.Y.S. 2d 521 (1964) and *Salzman Sign Co.* v. *Beck*, 10 N.Y. 2d 63, 217 N.Y.S. 2d 55 (1961).

INTEROCEAN has left completely unanswered the fact that the form of the supposed letter of guarantee prepared by DeSalvo and Germano of INTEROCEAN, was not the guarantee of NATIONAL as alleged but unquestionably the personal guarantee of Theodoracopulos. Yet, there is no testimony or documentary evidence whatever in the record to show that at any time during the negotiations the question of Theodoracopulos' personal guarantee was ever proposed to him.

INTEROCEAN cites *Trevor* v. *Wood*, 36 N.Y. 307 (1867) for the proposition that a telegram or telex bearing a typed signature may be sufficient to satisfy the New York Statute of Frauds and *Joseph Denunzio Fruit Co.* v. *Crane*, 79 F. Supp. 117 (S.D. Cal. 1948) motion for new trial granted 89 F. Supp. 962 (S.D. Cal. 1950), rev'd 188 F.2d 569 (9th Cir. 1951), cert. den. 342 U.S. 820 (1951), where under the

California Statute of Frauds a telex signed by an agent was held sufficient to bind his principal. *Trevor* v. *Wood,* however, merely involved a telegram evidencing agreement for purchase of Mexican dollars and *Denunzio* for the sale of a quantity of grapes. In New York, however, the legislature has since distinguished between a writing necessary to support a guarantee and one sufficient to indicate an agreement for the sale of goods or securities, and the degree of formality required by the Statute of Frauds for purposes of a guarantee is substantially greater. *Weiss* v. *Wolin,* 303 N.Y.S.2d 940 (Sup. Ct. Special Term 1969),

* * *

"... *Salzman* was a case involving § 5-701(2) of the General Obligations Law and the question arises as to whether a distinction can be drawn between the nature of the subscribed writing necessary to support a promise to answer for the debt of another and 'some writing' signed by the party to be charged therewith which would suffice 'to indicate' the agreement for the sale of securities (Uniform Commercial Code, § 8-319).

* * *

In recodifying the statute of frauds the legislature on the recommendations of the Law Revision Commission and the Commission on Uniform State Laws respectively, treated portions differently. Thus, agreements not to be performed within one year, guarantees, etc., and conveyances and contracts concerning real property, etc., are found in the General Obligations Law (§§ 5-701, 5-703). These statutes provide that any such agreement is void unless it or some note or memorandum thereof is in writing, subscribed by the party to be charged therewith.

On the other hand, agreements for the sale of goods or for the sale of securities were placed in § 2-201 and § 8-319 of the Uniform Commercial Code. These sec-

tions declare that such agreements are not enforceable unless there is some writing sufficient to indicate that the agreement had been made, signed by the party against whom enforcement is sought. The choice of language in each instance must be regarded as significant. . . . It is not straining to assume that the distinction was made between void contracts in the one case and 'unenforceable' contracts in the other because the first dealt with contracts which should be prepared with greater formality while the latter treated of agreements made daily in the market place." *Weiss* v. *Wolin, supra,* at pp. 942, 943.

B. National Was Not A Party To Any Agreement To Arbitrate.

The guarantee was not intended to be part of the charter under negotiation and the text of the guarantee prepared by DeSalvo contained no arbitration clause. The guarantee was entirely a separate agreement and the Court below so held. Under well settled law, therefore, NATIONAL did not agree to submit to arbitration any dispute it had with INTEROCEAN and there has been absolutely no showing of any basis for disregarding the separate corporate existence of NATIONAL and HELLENIC in this case. *Fisser* v. *International Bank,* 282 F.2d 231, 238 (2d Cir. 1960). (See Respondents' Main Brief pp. 64-66).

POINT IV

THE COURT'S EVIDENTIARY RULINGS WERE IMPROPER

A. The Court Improperly Limited The Cross-Examination of DeSalvo.

The extent of error in the Court's evidentiary ruling are set forth at pp. 67 through 73 of Respondents Main Brief.

With regard, however, to the contention of INTEROCEAN at Point V(A.) of its brief that the Court below properly interpreted DeSalvo's testimony and properly limited his cross-examination by counsel for Respondents, we submit that such rulings by the Court constitute reversible error. A Court may not arbitrarily allow one party to elicit testimony as to an ultimate issue and deny cross-examination on the same or related points. To do so is to misapply a discredited rule of declining respectability.[1] See McCormick On Evidence (2d Ed.) Section 12 and An Advisory Committee's Note to Rule 704 of the Proposed Rules of Evidence. A witness' state of mind respecting knowledge is a fact issue and bears on the conclusiveness of the witness' testimony. *Flynn* v. *Crume,* 101 Fed. 661 (7th Cir. 1939). The Court below therefore improperly cut-off the cross examination of DeSalvo and overlooked the material admissions on his part enunmerated in Respondents' Main Brief at pp. 69 to 71.

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[1] "The purpose here is not to show that the 'ultimate facts rule' is unsound, for that has already been done by eminent authorities." 7 WIGMORE, EVIDENCE §§ 1920-21 (3d ed. 1940); MCCORMICK, EVIDENCE § 12 1954); Stoebuck, Opinions on Ultimate Facts: Status, Trends and a Note of Caution, 41 Denver L.C.J. 226 (1964)

B. The Court Improperly Disregarded the Unimpeached Testimony of Respondent's Witnesses.

Insofar as the Court's opinion below mentions credibility the Court declared:

> "His [DeSalvo's] testimony, which was consistent and perfectly credible was supported by his contemporaneous notes, as well as by his sworn statement which had been taken of him by counsel for owners on April 6, 1971 when events were fresh in his mind". (App. 51A)

The Court by implication did not attach the same degree of credibility to the testimony of Respondent's witnesses Theodoracopulos and Spears. Germano of INTEROCEAN, although present in Court (R. 352), did not testify and a Court sitting without a jury may not arbitrarily reject evidence or totally disregard the unimpeached testimony of witnesses.

Theodoracopulos' testimony that he reached DeSalvo on the morning of March 18, objected to the characterization of a "fixture" in DeSalvo's telex of 5:36 P.M. the preceding afternoon and requested a *pro forma* so that he could review the proposed terms not only (R. 139-141) stands uncontradicted by DeSalvo, who merely claims lack of recollection, but on the 18th and 19th, DeSalvo in conjunction with Germano *did* prepare a *pro forma* which itself contained material deletions or additions to the "Mobiltime" form either not previously discussed or different from those set forth in the alleged "fixture" telex. (See Respondent's Main Brief, pp. 67-71.) The preparation by DeSalvo and Germano of such *pro forma* was an act utterly inconsistent with INTEROCEAN's claim that the telex of the 17th embodied a meeting of the minds as to all material and essential

terms. (R. 178) Similarly, Spears' testimony that he instructed DeSalvo as to Respondents' withdrawal from negotiations prior to any transmission by DeSalvo of Spears' counter as to drydocking is uncontradicted in the record and unquestionably there was no meeting of the minds as to drydocking. The failure of the Court below to accept such unimpeached testimony of Respondents' witnesses accordingly was clear and reversible error.

CONCLUSION

The findings and conclusions of the Court below are clearly erroneous as a matter of law and the Order directing respondents to arbitrate was improperly granted and should be set aside in its entirety.

Respectfully submitted,

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MARK M. JAFFE
Of Counsel

UNITED STATES COURT OF APPEALS
For the Scond Circuit

No. 74-1713

In the Matter of
A Motion to Compel Arbitration
between
Interocean Shipping Company
Petitioner-Appellee,
and
Natioaal Shipping and Trading Corp-
oration and Hellenic International
Shipping, S.A.,
Respondents-Appellants.

Affidavit of Service by Mail

STATE OF NEW YORK
COUNTY OF New York } ss.:

Robert McElroy , being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 32 Gramercy Park South , in the Borough of Manhattan , City of New York. On the 7th day of October, 19 74, at 4:30 o'clock p.m.;

I served 3 copies of the
REPLY BRIEF OF RESPONDENTS-APPELLANTS
in the above-entitled action on:

Haight Gardner Poor & Havens
1 State Street Plaza
New York, N. Y.

the attorney for the

by depositing same at their offices.

[redacted]

Sworn to before me this
day of , 19

MICHAEL J. HOOPS
Notary Public, State of New York
No. 30-4503056
Qualified In Nassau County
Commission Expires March 30, 1975